

South Carolina Environmental Law Project (SCELP)

Mission: To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

State & Federal Environmental Laws Regulating South Carolina's Wetlands

- Federal Clean Water Act
- S.C. Coastal Zone Management Act
- S.C. Pollution Control Act

S.C. Coastal Zone Management Act

Established two regulatory programs:

- **Critical Area Permits** required for all activities conducted within the beach/dune & tidelands systems (generally waters below the MHW mark)
- **Coastal Zone Consistency Certification** required for all federal & state permits within the coastal zone

The Coastal Zone Management Act directed the agency to "develop a comprehensive coastal management program, and thereafter have the responsibility of enforcing and administering the program" S.C. Code Ann. § 48-39-80.

- The procedure for passing the Coastal Management Program involved public hearings, provisions for public review, and affirmative approval by both the General Assembly and the Governor.
- The Coastal Council followed these statutorily prescribed procedures and the South Carolina Coastal Management Program was promulgated and became final in 1979.
- Amendments to the CMP were promulgated and approved in 1993 using the same procedures.

What does this mean?

- The Coastal Management Program is used by OCRM to regulate wetlands outside federal Clean Water Act jurisdiction, but that are within coastal zone
- Any state or federal permit will trigger review of a project for consistency with the Coastal Management Program
- If no state or federal permit is required, no consistency certification is required

CMP in a nutshell:

Residential development which would require *filling or other permanent alteration of* salt, brackish or *freshwater wetlands will be prohibited*, unless:

- no feasible alternatives exist or
- an overriding public interest can be demonstrated, and any substantial environmental damage can be minimized

CMP in a nutshell, con't:

Commercial proposals which require *fill or other permanent alteration of salt, brackish or freshwater wetlands will be denied* unless:

- no feasible alternatives exist and
- the facility is water-dependent

CMP in a nutshell, cont.

EXCEPTION: If wetlands master planning is used, wetlands one acre or less can be impacted

Challenges to the Coastal Management Program

- *Tony Porter, et al. v. OCRM*
 - Circuit Court ruling; case settled while pending before the Supreme Court
 - No final decision; Circuit Court Order vacated
- *Robert Setzer and John Gilgen v. DHEC*
 - "this tribunal is without authority to address the question. Whether or not the CZMP can be squarely characterized as a statute or regulation, it is an enactment of the South Carolina General Assembly that this tribunal, as an agency of the executive branch of government, must presume to be valid and having the full force and effect of law."







Challenges, continued

- *Spectre v. DHEC, et al.*

Administrative Law Judge ruled that the CMP is invalid, BUT

- that decision is not binding on any other court or even other judges in the ALC
- the ALJ decision is not a final decision
- Supreme Court has agreed to hear the appeal and briefs are due July 30







S.C. Pollution Control Act

It shall be unlawful for any person, directly or indirectly, to throw, drain, run, allow to seep or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes and other wastes, except as in compliance with a permit issued by the Department.

S.C. Pollution Control Act

- "Waters" means lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction.

In 1995 the Circuit Court ruled that wetlands are "waters of the State" and thus subject to the permitting requirements of the Pollution Control Act and state water quality regulations. *GCO Minerals Co. v. SCDHEC and SC Wildlife Federation*, Case No. 93-CP-40-0421

What we don't have:

A program that implements the Pollution Control Act's requirement for a permit to discharge into waters of the State when those waters fall outside the jurisdiction of the federal Clean Water Act

Local Tools

Comprehensive Planning Enabling Act, §6-29-510, *et seq.*

- Requires local planning commissions to develop a Comprehensive Plan

Local Tools

Comprehensive Plan must include a natural resources element which considers

- coastal resources,
- slope characteristics,
- prime agricultural and forest land,
- plant and animal habitats,
- parks and recreation areas,
- scenic views and sites,
- **wetlands**, and
- soil types

Local Tools, cont.

- To carry out the Comprehensive Plan, the Act authorizes zoning ordinances “for the general purposes of:
 - guiding development in accordance with existing and future needs and
 - promoting the public health, safety, . . . and general welfare”
- Local governments can enact ordinances “to protect and preserve scenic, historic, or ecologically sensitive areas”

Local Tools, cont.

Local governments beginning to implement Phase II NPDES permits through local stormwater ordinances, an opportunity to include:

- Restrictions on wetlands impacts
- Buffers and setbacks from wetlands and waters

In the end:

Regulation of wetland impacts can obviously be complex, involving several layers of review, including local, state and federal agencies, as well as the public.